

FEDERAL MAGISTRATES COURT OF AUSTRALIA

MINISTER FOR IMMIGRATION v SHARMA & ANOR [2012] FMCA 808

MIGRATION – Application by Minister for review of decision of Migration Review Tribunal – whether s.107 Migration Act notice valid – consideration of Full Court decision in *Brar* – whether bogus document given to an officer of the Department.

Migration Act 1958 (Cth), ss.97, 101, 103, 107, 108, 109, 359A

Brar v Minister for Immigration & Anor [2011] FMCA 435

Minister for Immigration and Citizenship v Brar [2012] FCAFC 30

Patel v MIAC & Anor [2011] FMCA 309

Minister for Immigration and Citizenship v Kang [2012] FMCA 732

Applicant: MINISTER FOR IMMIGRATION & CITIZENSHIP

First Respondent: JAY SHARMA

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: MLG 1381 of 2011

Judgment of: Burchardt FM

Hearing date: 22 August 2012

Date of Last Submission: 3 September 2012

Delivered at: Melbourne

Delivered on: 24 September 2012

REPRESENTATION

Counsel for the Applicant:	Mr Horan
Solicitors for the Applicant:	Clayton Utz
Counsel for the First Respondent:	Mr Hughan
Solicitors for the First Respondent:	Carina Ford Immigration Lawyers
Solicitors for the Second Respondent:	Australian Government Solicitor

ORDERS

- (1) That a writ of certiorari issue quashing the decision of the second respondent dated 19 August 2011.
- (2) That a writ of mandamus issue directed to the second respondent requiring the second respondent to determine the first respondent's application according to law.
- (3) That the first respondent pay the applicant's costs fixed in the sum of \$6,471.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT MELBOURNE**

MLG 1381 of 2011

MINISTER FOR IMMIGRATION & CITIZENSHIP
Applicant

And

JAY SHARMA
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introductory

1. This is an application by the Minister for judicial review of a decision of the Migration Review Tribunal (“Tribunal”) dated 19 August 2011. The Tribunal found at paragraph 34, Court Book (“CB”) 293, that:

“In light of the identified deficiencies in the s.107 notice issued to the applicant and dated 21 July 2010, the Tribunal has no alternative but to set the primary decision aside.”

2. The identified deficiency in the notice was that the s.107 notice referred to a bogus document being given to an officer of the Department when it was, in fact, presented to an authorised system,

having been lodged online. The Tribunal referred to and relied upon the decision of Driver FM in *Brar v Minister for Immigration & Anor* [2011] FMCA 435 in this regard.

3. Put shortly, the Minister contends that if there was any deficiency in the s.107 notice in this case of the sort identified in the Tribunal's decision, the deficiency is overcome by the decision of the Full Court of the Federal Court on appeal in *Brar*. The Minister further submits that this notice was, in any event, adequate in every way.
4. The first respondent (whom for convenience I shall refer to as "the respondent" given that the second respondent has filed a submitting appearance) takes issue with both of these propositions and primarily submits that the s.107 notice was inadequate on its face.
5. For the reasons that follow, I think the Minister's submissions are correct, and I will grant the relief that the application seeks.

History

6. The relevant facts are, to an extent, the subject of controversy. Nonetheless, what follows is uncontroversial and is essentially a paraphrase of the respondent's written submissions.
7. The respondent was born on 25 May 1985 in India, and arrived in Australia in 2004 on a student visa. He has asserted that between February 2007 and February 2008 he completed 1020 hours voluntary work as a pastry cook at Bakers Hut Bread Supplies. He asserts that between May and June 2008 he was employed by Bakers Hut.
8. On 30 June 2008, the respondent applied for a Skilled Sponsored visa. One of the criteria for the grant of that visa is that the skills of the visa applicant had been assessed by the relevant assessing authority as being suitable for the visa applicant's nominated occupation.
9. On 1 April 2008, Trades Recognition Australia ("TRA") provided the respondent with a positive assessment of his suitability for the occupation of pastry cook, thereby enabling him to meet the applicable criteria for the grant of his visa. It was thought at that time that TRA was the relevant assessing authority for that occupation, but it has

subsequently been discovered and is common cause that TRA had not been validly specified as a relevant assessing authority.

10. On 15 July 2009, the respondent was granted a subclass 886 visa, but on 21 July 2010 a delegate of the Minister wrote to the respondent with a notice of intention to consider cancellation. The notice purported to be issued in respect of breaches of s.101 and s.103 of the *Migration Act 1958* (“the Act”). Notwithstanding a response by the respondent, the delegate cancelled the visa.
11. The respondent applied to the Tribunal which, by the decision dated 19 August 2011 to which I have already referred, upheld his application.

The Law

12. Unfortunately, there is no avoiding setting out the relevant sections of the Act, which both parties agree are sections 97, 101, 103, 107, 108 and 109:

“97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

...

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and*
- (b) no incorrect answers are given or provided.*

...

103 Bogus Documents not to be given etc.

A non-citizen must not give, present or provide to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided.

...

107 Notice of incorrect applications

(1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:

- (a) giving particulars of the possible non-compliance; and*
- (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:*
 - (i) if the holder disputes that there was non-compliance;*
 - (A) shows that there was compliance; and*
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance – shows cause why the visa should not be cancelled; or*

- (ii) *if the holder accepts that there was non-compliance;*
- (A) *give reasons for the non-compliance;*
- and
- (B) *show cause why the visa should not be cancelled ; and*
- (c) *stating that the Minister will consider cancelling the visa:*
 - (i) *if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response-when that notice is given; or*
 - (ii) *if the holder gives the Minister a written response within that period-when the response is given; or*
 - (iii) *otherwise-at the end of that period; and*
- (d) *setting out the effect of sections 108, 109, 111 and 112, and*
- (e) *informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and*
- (f) *requiring the holder:*
 - (i) *to tell the Minister the address at which the holder is living; and*
 - (ii) *if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder – to tell the Minister the changed address.*
- (1A) *That period to be stated in the notice under subsection (1) must be:*
 - (a) *in respect of the holder of a temporary visa-the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or*

- (b) *otherwise-14 days.*
- (1B) *Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:*
 - (a) *visas of a stated class; or*
 - (b) *visa holders in stated circumstances; or*
 - (c) *visa holders in a stated class of people (who may be visa holders in a particular place); or*
 - (d) *visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.*
- (2) *If the visa holder responds to the notice, he or she must do so without making any incorrect statement.*

...

108 Decision about non-compliance

The Minister is to:

- (a) *consider any response given by a visa holder in the way required by paragraph 107(1)(b); and*
- (b) *decide whether there was non-compliance by the visa holder in the way described in the notice.*

109 Cancellation of visa if information incorrect

(1) *The Minister, after:*

- (a) *deciding under section 108 that there was non-compliance by the holder of a visa; and*
 - (b) *considering any response to the notice about the non-compliance given in a way required by paragraph 107(1)(b); and*
 - (c) *having regard to any prescribed circumstances; may cancel the visa.*
- (2) *If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist circumstances declared by*

the regulations to be circumstances in which a visa must be cancelled.”

The Notice of Intention to Consider Cancellation ("the NOICC")

13. The NOICC is set out at pages 114 to 123 of the Court Book. Having set out the terms of ss.101 and 103, particulars were given of the alleged contraventions of those sections.

14. In relation to s.101, the essential allegation made was that the respondent had not, in fact, worked for Bakers Hut Bread Supplies as asserted. Relevantly, the notice said (CB115):

“It appears that you have provided incorrect information to the Department in your application when you stated that you have worked at the Bakers Hut Bread Supplies from 22/02/2007 until 13/02/2008.”

15. In relation to s.103, having set out, in terms, s.97 of the Act (dealing with the definition of a bogus document) and the criteria for the grant of a Regulation 886 subclass visa, the delegate said (CB116):

“As a result of this regulation, you had your skills assessed by Trades Recognition Australia (TRA), the relevant assessing authority for your nominated occupation. As part of this assessment, you submitted evidence to TRA that you had 900 hours of work experience in this occupation.”

16. In fact, the application made by the respondent had included a work reference which referred to 1020 hours of professional pastry cook experience but in my view, no confusion could arise out of this aspect of the matter. Plainly the 1020 hours was intended to meet the 900 hours in the regulation.

17. At CB117, the delegate went on:

“As part of an ongoing investigation by the Department, adverse information regarding your claimed work experience was obtained. As part of this investigation a previous employee of Bakers Hut Bread Supplies was contacted regarding the work reference you provided.

The previous employee of Bakers Hut Bread Supplies made admissions that this business prepared fake work references for

students and charged money for these references when the student had not completed 900 hours of work experience with them.

The work reference you provided from Bakers Hut Bread Supplies is therefore purports to have been, but was not, issued in respect of the person, in this case, you.

It meets with the definition of a bogus document within the meaning of section 97 of the Act.

The skills assessment from TRA was therefore obtained because of a false or misleading statement, whether or not made knowingly. By this definition the TRA skills assessment is also a bogus document within the meaning of section 97 of the Act.

I consider that you used this bogus document to obtain a positive assessment from TRA.

You then presented this skills assessment to an officer of the Department who was performing a function under the Act (that function being assessing the client's visa application).

In giving the TRA skills assessment, which is a bogus document to an officer of the department, you have failed to comply with s103.

I consider therefore that you have not complied with Sections 101(b) and 103 of the Act because in support of your application and in order to satisfy the legislative requirements for grant of a visa, you have made incorrect statements, provided incorrect information and caused a bogus document to be given to the department.”

18. Following receipt of the NOICC, the respondent responded (see CB124). Relevantly, the respondent said:

*“Replying in context to the letter being sent to me, I hereby would like to inform you that, the documents I provided at the time of processing my Trade Recognition Australia are **not** forged and bogus.*

I did undertake more than 900+ Hours of Voluntary experience under the guidance of the business owners at the time of operation. As the experience was totally voluntary, I was never meant to follow a time schedule, as I was a full time student, and I had different commitments during that period of time.

I undertook my voluntary experience from 22/02/2007 till 13/02/2008, however I was still in touch with the business owner in regards to my future prospects, I was a very hard working and a passionate learner, which I still have it in me and will always do.”

19. The respondent went on to make various other comments and appended, amongst other things, what purported to be a Statutory Declaration of Deniz Kordemir, the owner of the business. It must be said that the signature at CB128 appears radically different from the signatures of Mr Kordemir at CB11 and 62, which were provided with the visa application and by the respondent’s representative.

The Tribunal's Decision

20. Having described the application for review and referred to the relevant law, the Tribunal dealt with “Claims and Evidence” at CB290 to 292. The Tribunal referred to a s.359A letter it had written to the respondent on 1 August 2011, drawing attention to the matters to do with Bakers Hut, including the differences in signature to which I have referred of Mr Kordemir.

21. Under the heading "Findings and Reasons", the Tribunal said, in relation to the non-compliance with s.101 (CB293):

“... The Tribunal does not regard the alleged breach of s.101 as being adequately particularised or as having any basis, and dismisses it accordingly.”

22. No explanation was given for that reasoning. Nonetheless, it should be noted that in the hearing before the Court, the Minister has taken no issue with the s.101 aspect of this application and it is therefore not necessary for me to consider it further.

23. The Tribunal went on to say at CB293:

“Turning to the alleged non-compliance with s103, the Tribunal notes that the s.107 notice referred to a bogus document being given to an officer of the Department when it was in fact presented to an authorised system, having been lodged online. In this connexion, the Tribunal notes the very recent remarks of the Court in Brar v MIAC & Anor [2011] FMCA 435, in Driver FM opined (at [23]) that even where "(t)he notice was validly

issued as the requirements of s.107 were met and the particulars were sufficiently clear for (the applicant) to respond...", such an error amounts to jurisdictional error. His Honour went on to observe, that it was open to the delegate to issue another s.107 notice, better particularising the alleged non-compliance, once having been alerted to the deficiency."

24. Having referred to the decision of *Patel v MIAC & Anor* [2011] FMCA 309, which does not seem to me to be relevant in this instance, the Tribunal continued:

"In light of the identified deficiencies in the s.107 notice issued to the applicant and dated 21 July 2010, the Tribunal has no alternative but to set the primary decision aside."

25. The Tribunal went on to set aside the decision until review, and substituted a decision not to cancel the applicant's subclass 886 visa.

The Submissions of the Applicant

26. The first point made by the Minister is that the bogus documentation supplied by the respondent (the TRA assessment) was, in fact, not provided to an authorised system, but to an officer of the Department. At CB81 there is a letter to the respondent's representative from Jimmy Palmani requesting various documents. The email reply from the representative is at CB87 and following. The email commences, "Dear Jimmy." It was submitted that, in fact, this documentation was provided to an officer of the Department and not to an authorised system.
27. There would seem to me to be force in this submission. For reasons to which I shall come, I will uphold it.
28. The second submission made by counsel was that the Tribunal fell into jurisdictional error by constructively failing to exercise jurisdiction because of the conclusion the Tribunal reached about the s.107 notice. It will be remembered that the finding of the Tribunal was that the notice was deficient because it referred to a bogus document being given to an officer of the Department when it was in fact presented to an authorised system, having been lodged online.

29. This conclusion was submitted to be erroneous in the light of the decision of the Full Court of the Federal Court in *Minister for Immigration and Citizenship v Brar* [2012] FCAFC 30.

30. As will be seen from the decision of the Full Court in *Brar* at [9], part of the s.103 evidence of non-compliance notice was:

“You then presented the positive skills assessment from TRA to an officer of the department who was performing a function under the Act (that function being assessing the client's visa application).”

31. The Full Court observed:

“The words we have italicised are significant in terms of one of the principal arguments on the appeal.”

32. From the Full Court's analysis of the decision of Federal Magistrate Driver, it is clear that the Court was aware that Federal Magistrate Driver had held the s.107 notice to be invalid because it asserted that the bogus document had been provided to an officer when, in fact, it had been provided to an authorised system.

33. At [61]-[62] the Full Court said:

“In our opinion, it was not Parliament's intention that all departures from the statements made in a notice under s 107 deprive the decision-maker of jurisdiction under ss 108 and 109 to making findings of non-compliance by the visa holder in the way described in the notice. The phrase “in the way described in the notice” must be read in light of the purpose of the statutory scheme which is to ensure that the visa holder has notice of the alleged non-compliance and an opportunity to dispute the allegations and to respond to them. A departure which is minor and insignificant in the context of the facts of a particular case and which does not go to the substance of the allegations of non-compliance does not deprive the decision-maker of jurisdiction under ss 108 and 109. The departure in this case should be so characterised. The central issue in terms of the allegations of non-compliance was the accuracy or otherwise of the work reference letter from Dom's and adequate particulars of the allegations with respect to that issue were given in the notice under s 107. Furthermore, the notice clearly referred to the date upon which the respondent lodged his application and the address to which it was sent (see [5] above).

The respondent and his advisers would not have been under any misapprehension as to the occasion upon which it was said that he had failed to comply with s 103 of the Act. Finally, even if the bogus document was given, presented or provided to an authorised system, it seems clear enough that eventually it would have come to the attention of an officer of the Department.

[62] We uphold the appellant's challenge to the Federal Magistrate's conclusion with respect to the s 107 notice issue."

34. The remainder of submissions of counsel for the Minister was predominantly, in effect, responsive to the written submissions of the respondent. It is convenient to deal with those submissions now.

The Respondent's Submissions

35. The respondent's submissions concentrated, naturally enough in view of the Full Court decision in *Brar*, not on the particular basis upon which the Tribunal in fact determined the matter. Rather, emphasis was placed upon the proposition that the s.107 notice was confusing and inoperative to comply with the terms of the Act.
36. First, it was asserted that the notice referred to completing 900 hours of work, something the respondent never claimed to have worked save insofar as he claimed that he had worked for more than 900 hours (see respondent's written submissions paragraph 24). In my view, in circumstances where;
- a) The Department had asked for evidence of 900 hours' work experience (CB81) and the respondent's representative had responded with the Bakers Hut letter showing 1020 hours, (CB88).
 - b) The NOICC referred to the claimed 1020 hours (CB115) and referred (also CB115) to the fact that "the student had not completed 900 hours of work experience".
 - c) The NOICC referred (CB116) in relation to the TRA assessment, "as part of this assessment, you submitted evidence to TRA that you had 900 hours of work experience".

d) The respondents response stated (CB 124) “I did undertake 900 + Hours of Voluntary experience”

e) this criticism can not be made out.

37. Next it was submitted that:

“It is not asserted in the notice that the first respondent was one of the "students" referred to by the previous employee of Bakers Hut Bread Supplies, whom the investigation team had contacted.”

38. In the circumstances where the NOICC was plainly addressed to the respondent, and in the context in which the assertion was made, it is quite clear that the notice was indicating that the respondent was one of the students who were referred to. It should be noted that the notice stated, albeit in the part under the heading section 101:

“Information received indicated that you may have never worked at Bakers Hut Bread Supplies as claimed.”

39. Further, and this was probably the point most stressed, it was submitted that the allegation that the work reference "purports to have been but was not issued in respect of the person, in this case you" was clearly misleading. It was submitted that the work reference was quite obviously issued in respect to the respondent. I accept that criticism.

40. Once again, however, and bearing in mind the scheme of the legislation as propounded by the Full Court in *Brar* at [61], looked at overall it is quite clear that what the sentence was trying to bring forward as a proposition was that the work reference was a bogus document. It was inelegantly phrased, but would not have misled the respondent.

41. In this regard the respondent's response, already referred to above, makes it quite clear that he was not in any way misled by the documentation.

Consideration

42. It is clear in the light of the decision of the Full Court of the Federal Court in *Brar*, that the particular basis upon which the Tribunal concluded that the s.107 notice was invalid cannot be upheld. The

Tribunal constructively failed to exercise its jurisdiction because of a complete misunderstanding (natural enough in the circumstances) of the state of the law. This aspect of the appeal must be upheld.

43. Further, in the light of the Full Court's remarks in *Brar*, the submission made by the respondent about provision of the bogus document to an authorised system cannot be upheld. It clearly came directly to the attention of a member of the Department to whom, in fact, it was actually addressed. (See *Brar* at [61]).
44. Finally, looking at the NOICC as a whole, it is clear that it was sufficient to fulfil the function for which it was intended, namely to give the applicant a fair understanding of why it was that his visa might be cancelled and to give him an opportunity to respond as, indeed, he did.
45. It should be noted that, at least as I read it, the Tribunal did not determine the application before it on the basis of any detailed consideration of the adequacy of the s.103 non-compliance. This was because the matter was decided on the issue of provision to an on-line system, based on FM Driver's decision, now reversed in *Brar*. Rather, the Tribunal made only very brief reference to the s.101 point.
46. Nonetheless, for completeness and given that the matter has been argued on this footing, it seems appropriate, in my view, to deal with the alleged deficiencies in the notice, and for the reasons I have outlined, in my view, the criticisms advanced of it are not made out.
47. At the conclusion of the hearing, I invited the parties to present written submissions to the Court arising out of a decision of FM Turner in *Minister for Immigration and Citizenship v Kang* [2012] FMCA 732, a decision handed down on 24 August 2012. Both parties provided written submissions.
48. I note that FM Turner arrived at the same conclusions, relevantly for these purposes, as I have reached in this case. Nonetheless, it should be noted that the particular issues before FM Turner in *Kang* were slightly different to those here. As is almost always the case, the particular result in *Kang* depended on its own particular circumstances.

49. Nonetheless, to the extent that is applicable I am comforted by the fact that FM Turner's conclusions are relevantly the same as my own.

Conclusion

50. In these circumstances, in my view, the application should succeed. I will make the orders sought by the Minister.

I certify that the preceding fifty (50) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Date: 24 September 2012